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No. 90-1156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether states or municipalities have jurisdiction to review the "prudence" of decisions that a utility made during construction of a wholesale electrical generating plant and to bar recovery of, and thereby "trap," over $135 million of wholesale costs that the Federal Energy Regulatory Commission ("FERC") found to be "just and reasonable" and ordered the utility to incur?

RULE 29.1 STATEMENT

Petitioner New Orleans Public Service Inc. ("NOPSI") is a wholly-owned subsidiary of Entergy Corporation ("Entergy"). Entergy has no parent company, and neither Entergy nor NOPSI has any subsidiaries that are not wholly-owned by Entergy either directly or through other wholly-owned subsidiaries.

PARTIES BELOW

NOPSI was the plaintiff in the District Court. The defendants were The Council of the City of New Orleans, Joseph I. Giarrusso, Lambert C. Boissiere, Jr., Michael Early, James Singleton, Dorothy Mae Taylor, Johnny Jackson, and Peggy Wilson. In addition, the Alliance for Affordable Energy, Inc., Citizens for Safe Energy, Inc., and Gary L. Groesch were granted leave to intervene on the side of defendants after the District Court's and the Fifth Circuit's initial decisions were reversed and remanded by this Court in *NOPSI* v. *Council of New Orleans,* 491 U.S. 350 (1989).

TABLE OF CONTENTS

	Page
Question Presented	i
Ruie 29.1 Statement	ii
Parties Below	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions	2
Statement of the Case	2
A. The FERC Orders And Their Background	4
1. NOPSI And The Middle South System	4
2. Grand Gulf And The MSU Fuel Diversification Program Of The 1970s	6
3. The FERC Proceedings	7
B. The Council's Retail Rate Proceedings And Its Grand Gulf Disallowance Order	13
C. This Case And The Subsequent State Proceedings	16
Summary of Argument	20
Argument	22
I. The Fifth Circuit's Holding Is Contrary To The Terms Of The Federal Power Act And To FERC's Consistent Interpretation Of Them	23
II. The Fifth Circuit's Holding Is Contrary To *MP&L, Nantahala,* And Their Numerous Precursors	28

	Page
A. *Nantahala* And *MP&L* Establish FERC's Exclusive Jurisdiction Over Claims Of "Imprudence" After Plant Construction Has Begun	30
B. As In *MP&L* And *Nantahala*, The Prudence Disallowance Does Not Involve "Cost Savings In Other Areas"	34
C. *MP&L* And *Nantahala* Were Not Overruled By This Court's Subsequent Abstention Opinion In This Case	35
III. The Council's Order Has Relitigated The Very Matters That Were Before FERC And Has Collaterally Attacked FERC's Findings	37
A. The Council's Findings And Assumptions Are Inconsistent With FERC's Orders In Three Fundamental Respects	37
1. The Council Has Collaterally Attacked The Reasonableness Of NOPSI's 17% Allocation	38
2. The Council Has Collaterally Attacked The Joint Planning Requirements	40
3. The Council Has Collaterally Attacked FERC's Cost Allocation Principles	41
B. Such Collateral Attacks Are Facially Preempted By FERC's Orders	43
Conclusion	45

TABLE OF AUTHORITIES

Cases	Page(s)
Alliance for Affordable Energy, Inc. v. *Council of New Orleans*, 578 So. 2d 949 (La. Ct. App. 4th Cir. 1991)	19, 20
Appeal of Sinclair Machine Products, Inc., 126 N.H. 822, 498 A.2d 696 (1985)	22, 43
Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983)	23, 24
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	29, 42
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	16
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)	29, 37, 39
City of New Orleans v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990)	12, 13
Eastern Edison Co. v. *Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1984)	26
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	25
FPC v. *Southern California Edison Co.*, 376 U.S. 205 (1964)	23, 24
Kentucky West Virginia Gas Co. v. *Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988)	36
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	29
Massachusetts v. *United States*, 729 F.2d 886 (1st Cir. 1984)	24
Mississippi ex rel. Pittman v. *Mississippi Public Service Commission*, 506 So. 2d 978 (Miss. 1987)	32
Mississippi Industries v. *FERC*, 808 F.2d 1525, *modified in part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied*, 484 U.S. 985 (1987)	12
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988)	*passim*

	Page(s)
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	29
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986)	*passim*
NOPSI v. *Council of New Orleans*, 782 F.2d 1236 (5th Cir. Feb. 14, 1986), *modified on reconsideration*, 798 F.2d 858 (5th Cir. Sept. 2, 1986)	13
NOPSI v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987)	13
NOPSI v. *Council of New Orleans*, 491 U.S. 350 (1989)	*passim*
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982)	24
Northern Natural Gas Co. v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963)	29
Northern States Power Co. v. *Hagen*, 314 N.W.2d 32 (N.D. 1981)	27
Northern States Power Co. v. *Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn. 1984)	27
Pennsylvania Water & Power Co. v. *FPC*, 343 U.S. 414 (1952)	25
Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 (1946)	23
Public Utilities Commission of Ohio v. *United Fuel Gas Co.*, 317 U.S. 456 (1943)	36
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)	23
Schneidewind v. *ANR Pipeline Co.*, 485 U.S. 293 (1988)	29
Younger v. *Harris*, 401 U.S. 37 (1971)	16, 35, 36

	Page(s)
Administrative Decisions	
AEP Generating Co., 36 FERC (CCH) ¶ 61,226 (1986)	27
AEP Generating Co. and Kentucky Power Co., 38 FERC (CCH) ¶ 61,243 (1988)	27
Arizona Public Service Co., 25 FERC (CCH) ¶ 63,025 (1983), *aff'd*, 27 FERC (CCH) ¶ 61,185 (1984)	27
Arizona Public Service Co., 21 FERC (CCH) ¶ 63,007 (1982), *aff'd*, 23 FERC (CCH) ¶ 61,419 (1983)	27
Arizona Public Service Co., 27 FERC (CCH) ¶ 61,185 (1984)	27
Connecticut Light & Power Co., 43 FERC (CCH) ¶ 63,029 (1988), *aff'd*, 48 FERC (CCH) ¶ 61,139 (1989)	27
Kansas Gas & Electric Co., 39 FERC (CCH) ¶ 63,013 (1987), *aff'd*, 49 FERC (CCH) ¶ 61,295 (1989)	26
Middle South Energy, Inc., 26 FERC (CCH) ¶ 63,044 (1984)	*passim*
Middle South Energy, Inc., FERC Opinion No. 234, 31 FERC (CCH) ¶ 61,305 (1985)	*passim*
Middle South Energy, Inc., 32 FERC (CCH) ¶ 61,207 (1985)	8
Middle South Energy, Inc., FERC Opinion No. 234-A, 32 FERC (CCH) ¶ 61,425 (1985)	*passim*
Middle South Services, Inc., 30 FERC (CCH) ¶ 63,030 (1985)	3, 6, 12
Minnesota Power & Light Co., 11 FERC (CCH) ¶ 61,312 (1980)	26

	Page(s)
New England Power Co., 31 FERC (CCH) ¶ 61,047 (1985), *aff'd sub nom., Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986)	26, 33
New England Power Co., 32 FERC (CCH) ¶ 61,112 (1985)	26
Northern States Power Co., 17 FERC (CCH) ¶ 61,196 (1981), *aff'd sub nom., South Dakota Public Utilities Commission* v. *FERC*, 690 F.2d 674 (8th Cir. 1982)	27
System Energy Resources, Inc., FERC Opinion No. 292, 41 FERC (CCH) ¶ 61,238 (1987)	3, 11, 12
System Energy Resources, Inc., FERC Opinion No. 292-A, 42 FERC (CCH) ¶ 61,091 (1988)	3, 12
Union Electric Co., 35 FERC (CCH) ¶ 63,076 (1986)	26
Union Electric Co., 40 FERC (CCH) ¶ 61,046 (1987), *rev'd on other grounds*, 890 F.2d 1193 (D.C. Cir. 1989)	26

Statutes

Federal Power Act, 16 U.S.C. §§ 791-828	
Section 201	24, 28
Section 205	8, 24, 25
Section 206	8, 24, 25, 28
Section 306	25
15 U.S.C. § 79	4, 23
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1738	17
La. Civ. Code art. 3556(31)	17
La. Code Civ. Proc. art. 1842	17

Miscellaneous

	Page(s)
18 C.F.R. §§ 4-141	36
Brief Of Council Of City Of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, No. 86-1970 (filed January 22, 1988)	31
Brief on Exceptions of the City of New Orleans, Louisiana (March 5, 1984), *Middle South Energy, Inc.*, FERC Docket No. ER82-616-000	8
Brief on Exceptions of the City of New Orleans, Louisiana (March 6, 1985), *Middle South Services, Inc.*, FERC Docket No. ER82-483-000	8, 10

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PETITIONER'S BRIEF

OPINIONS BELOW

The Fifth Circuit's opinion of August 29, 1990 is reported at 911 F.2d 993 and reprinted at pages 2A-24A of the Petition for Certiorari ("Cert. App."). On February 8, 1991 (after the Petition was filed), the Fifth Circuit amended this opinion by deleting the phrase ", the amount the Council had argued NOPSI should bear in the FERC proceedings" from p. 6089 of the Slip Opinion (Cert. App. 8A), and the opinion, as thus amended, is reprinted at pages 11-33 of the Joint Appendix ("J.A."). The opinion of the District Court (Cert. App. 26A-32A) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 29, 1990. Cert. App. 2A; J.A. 11. On October 17, 1990, the Court of Appeals denied rehearing. Cert. App. 34A. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. 791a-828c, are reprinted at Cert. App. 35A-46A.

STATEMENT OF THE CASE

Introduction

This case presents the same question that was decided in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) (*"Nantahala"*), and in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore* (*"MP&L"*), 487 U.S. 354 (1988): whether a state or municipality may use its retail ratemaking authority to nullify a FERC decision that allocates wholesale electrical generating costs among affiliated utilities that serve different states. Indeed, this case involves the same FERC orders that were at issue in *MP&L* and a retail ratemaking order that does precisely what was held *per se* unlawful in *MP&L*. This Order has "prevented NOPSI from recovering" (Cert. App. 2A; J.A. 11)—and thereby has "trapped"—costs of the Grand Gulf nuclear power plant that FERC found to be "just and reasonable" and ordered NOPSI to incur. *See MP&L*, 487 U.S. at 372.

Here, as in *MP&L*, the retail ratemaking proceeding amounts to a collateral attack on FERC determinations. The City of New Orleans participated in the massive FERC proceeding that established "just and reasonable" wholesale rates for Grand Gulf power and that allocated its costs among NOPSI and the other affiliated utilities that comprise an integrated multistate utility system. New Orleans there urged FERC to prescribe rates in which NOPSI and its retail ratepayers would be allocated 9% of Grand Gulf and would receive correspondingly greater benefits of the system's lower-cost coal power. In 1985, FERC rejected these arguments and ordered NOPSI to purchase 17% of the output of Grand Gulf at FERC-approved wholesale rates.

However, The Council of the City of New Orleans has barred NOPSI from recovering over $135 million of these FERC-mandated costs on the ground that a "prudent" utility would have avoided them. In particular, the Council found that if NOPSI had been prudent, it would, in 1979-1980, have sold off all but 9% of the then-contingent interest in Grand Gulf, obtained equivalent amounts of lower-cost coal power instead, and thereby reduced its future wholesale costs by the *precise amounts* that the City unsuccessfully asked FERC to order in 1985, five years later.

As FERC and the United States have stated, the Council's Order rests on grounds that are within FERC's exclusive jurisdiction, that could have been raised before FERC, and that, in many instances, were in fact raised by New Orleans or other parties and rejected by FERC.[1]

Because the pertinent FERC orders[2] and the Council's Order have each been before the Court before, many of the pertinent facts can be set forth briefly.

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[1]Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae Supporting Petitioner ("Feb. 1991 FERC Amicus Br."), pp. 11-16 (February, 1991).

[2]Six different FERC orders are germane. The allocations and wholesale rate determinations were initially addressed in two decisions of administrative law judges (*Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (1984) and *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (1985)), and two decisions by FERC. *Middle South Energy, Inc.*, FERC Opinion No. 234, 31 FERC (CCH) ¶ 61,305 (1985), and *Middle South Energy, Inc.*, FERC Opinion No. 234-A, 32 FERC (CCH) ¶ 61,425 (1985). Following a decision by the D.C. Circuit, FERC issued two orders reaffirming and further explaining the basis for its previous allocation. *System Energy Resources, Inc.*, FERC Opinion No. 292, 41 FERC (CCH) ¶ 61,238 (1987), and *System Energy Resources, Inc.*, FERC Opinion No. 292-A, 42 FERC (CCH) ¶ 61,091 (1988). Each FERC decision will be cited as "____ FERC at ____."

For the Court's convenience, NOPSI has lodged with the Court ten separately-bound volumes that each contain copies of the foregoing FERC opinions.

A. The FERC Orders And Their Background.

1. NOPSI And The Middle South System.

Like MP&L, petitioner NOPSI is one of four operating utilities that is owned by Entergy Corporation (formerly known as Middle South Utilities, Inc.) ("MSU"), which is a public utility holding company.[3] These four MSU operating companies each provide retail and wholesale electric service in separate service areas in four different states, and their retail rates are regulated by five different state and local ratemaking bodies. NOPSI provides retail electric service in New Orleans, and its retail rates are regulated by The Council of the City of New Orleans ("Council" or "Council of New Orleans").

The MSU operating companies are required to be planned and "operated as a single interconnected and coordinated [interstate] system"—the MSU system—because this integration has been found to produce cost savings that are unobtainable by the individual companies. 15 U.S.C. §§ 79b(a)(29) & 79k(b); *see* J.A. 108. Thus, although NOPSI and the other MSU operating companies each separately own some generating capacity, "the four [MSU] companies operate as an integrated power pool" in which the companies make "wholesale sale[s] of electricity to each other." *MP&L*, 487 U.S. at 357. Each MSU company "transmit[s] the electricity [it] produce[s] to a central dispatch center and . . . draws back the power it needs to meet customer demand." Cert. App. 3A-4A; J.A. 12.

The arrangements for the generation, sale, and exchange of electricity among the MSU companies have been governed by a series of power pool agreements ("System Agreements") that are

[3]Louisiana Power & Light Company ("LP&L") and Arkansas Power & Light Company ("AP&L") are the other two MSU operating companies. In addition, MSU owns a separate generating subsidiary, System Energy Resources, Inc. (formerly Middle South Energy, Inc.) ("MSE"). MSE has title to the MSU system's 90% interest in the Grand Gulf Unit 1 nuclear power plant generating station ("Grand Gulf").

filed with FERC and that are binding FERC rate schedules. *MP&L*, 487 U.S. at 357.[4] These agreements provide "the basis for planning and operating the companies' generating units on a single-system basis" and determine how the MSU operating companies share the system's costs of electric capacity[5] and electric energy.[6] *MP&L*, 487 U.S. at 357.

In particular, the system agreement requires that generation planning be performed by a system-wide Operating Committee, which is comprised of one representative from each MSU operating company and one representative from MSU. This Committee establishes a "generation addition plan" for the system as a whole. J.A. 41. The Operating Committee decides when generating facilities will be added, what types to add, and which MSU company will construct, or obtain, the new facilities. *See* 31 FERC at 61,647-50. Because long-term contracts are an alternative way in which a utility acquires generating capacity, the Operating Committee similarly decides whether an individual operating company may purchase capacity from outside sources or make off-system sales of capacity to other unaffiliated utilities.[7]

In short, although an individual MSU operating company has some "autonomy" under the system agreements (*e.g.*, in managing construction of those plants it is assigned to build), it is the system Operating Committee that determines the kinds and

[4]During the planning and construction of Grand Gulf, the applicable FERC rate schedule was the 1973 System Agreement. J.A. 34-54.

[5]"Capacity" is the amount of electricity available from a generating unit or facility at any one time. A system must have capacity that exceeds "peak" demand, plus a reasonable reserve. Capacity is measured in kilowatts. Capacity costs are the fixed costs of either owning a generation unit or purchasing generating capacity under contract.

[6]"Energy" is the amount of electricity delivered over time; it is measured in kilowatt-hours. Energy costs are the variable costs (*e.g.*, labor and fuel) of each unit of electricity produced by a plant.

[7]*See* 1973 System Agreement, § 4.01 (requiring Operating Committee approval of off-system sales) (J.A. 40-42) & § 4.02 (requiring Operating Committee approval of off-system purchases) (J.A. 42).

quantities of generating capacity that the MSU companies have. *See* 31 FERC at 61,645-51; 30 FERC at 65,141-43. This centralized planning has meant that different MSU companies often have different amounts of capacity relative to their needs and different "mixes" of high-cost and low-cost power. But the System Agreements have prevented significant disparities in the generating costs of the MSU operating companies by requiring "equalization" payments from operating companies that have less than their share of system capacity ("short companies") to companies that have more than their share ("long companies"). *See MP&L*, 487 U.S. at 357, 360. NOPSI has been a "short" company during all periods pertinent to this case.

2. Grand Gulf And The MSU Fuel Diversification Program Of The 1970s.

In the late 1960s, Middle South made a system decision to meet projected increases in demand by ending its exclusive dependence on gas and oil-fired generating facilities and by adding nuclear and coal-fired generation. As part of this effort,[8] Middle South Energy ("MSE") was formed in 1974 to construct and operate Grand Gulf. *MP&L*, 487 U.S. at 358.

The information available in 1974 showed that Grand Gulf would be needed to meet projected increases in system demand. However, it was apparent by the late 1970s that system-wide demand "would be lower than had been forecast" and that the plant would be costlier to build than had been originally anticipated due to severe inflation and to the regulatory delays that would result from the 1979 Three Mile Island accident. *MP&L*,

[8]The system Operating Committee had earlier assigned the construction of nuclear plants to AP&L (ANO 1 and 2) and to LP&L (Waterford 3 and 4), and it was originally planned that MP&L and NOPSI would each finance and construct one of the Grand Gulf nuclear units. *See* 26 FERC at 65,102. However it proved infeasible for NOPSI and MP&L to finance and build Grand Gulf, so MSE was formed for that purpose. *MP&L*, 487 U.S. at 358 & n.3.

487 U.S. at 359. MSU then deferred or cancelled other planned nuclear and coal-generating facilities. But Grand Gulf 1 was 70% finished in 1980, and MSU decided to complete it because it believed that "the relatively low cost of nuclear fuel would make the overall cost of Grand Gulf power per kilowatt hour lower than that of alternative energy sources." *MP&L*, 487 U.S. at 359.

However, inflation and the "additional construction requirements" that the Nuclear Regulatory Commission imposed led to far greater increases in the costs of completing Grand Gulf 1 than had been anticipated—as they did in the case of an LP&L plant (Waterford 3) and "virtually every nuclear power facility [then] being constructed in the United States." *MP&L*, 487 U.S. at 367 n.9; *see id.* at 358 n.3. Grand Gulf 1 ended up costing $2,933 per kilowatt of capacity when it began operations—or approximately six times the original forecast. *MP&L*, 487 U.S. at 359 & n.5. FERC found that these cost escalations between 1980 and 1985 were "unforeseen" and "unexpectedly dramatic" (31 FERC at 61,654-55) and that the decision to complete Grand Gulf had been "prudent."[9]

3. The FERC Proceedings.

In 1982, the Middle South system filed two new agreements with FERC as rate schedules. The first of these agreements—the Unit Power Sales Agreement ("UPSA")—established the wholesale rates for Grand Gulf power and allocated its energy and capacity among the MSU operating companies. The second—the 1982 System Agreement—otherwise modified the method by which overall generation capacity costs are equalized among the MSU operating companies.

[9]Administrative Law Judge Liebman expressly so found:

> "[C]ontinuing construction of Grand Gulf Unit No. 1 was prudent because Middle South's executives believed Grand Gulf would enable the Middle South system to diversify its base load fuel mix and, it was projected, at the same time, [to] produce power for a total cost (capacity and energy) which would be less than existing alternatives on the system."

26 FERC at 65, 112-13. FERC "approved" this finding. *MP&L*, 487 U.S. at 363; *see* 31 FERC at 61,666 (affirming ALJ Liebman's findings to the extent not modified).

Pursuant to Sections 205 and 206 of the Federal Power Act, FERC instituted two separate dockets (before ALJs Head and Liebman) to investigate these rate schedules and to assure that they are "just, reasonable, and nondiscriminatory." MSE submitted voluminous testimony that (1) reviewed the MSU system's decisionmaking over the period from the late 1960s to 1982, (2) showed that it had appeared that the total generating costs of Grand Gulf power would be lower than all available alternatives at each pertinent time during this period, and (3) otherwise defended the proposed rates and allocations. *See MP&L,* 487 U.S. at 360-62.

New Orleans and representatives of each other affected jurisdiction (Mississippi, Arkansas, and Louisiana) intervened in this proceeding because they recognized that FERC's decision would have "substantial rate impacts" on each of the MSU operating companies and their retail customers. *Middle South Energy, Inc.,* 32 FERC (CCH) ¶ 61,207 at 61,478 (1985); *see MP&L,* 487 U.S. at 375. Indeed, New Orleans repeatedly stated that the FERC rates and allocations would have to be included in retail rates and that FERC had to protect the interests of retail ratepayers in New Orleans (and elsewhere) in avoiding "excessive" or "discriminatory" wholesale rates.[10]

New Orleans and other affected jurisdictions did not challenge the "uncontroverted testimony" that building and completing Grand Gulf had been prudent. *MP&L,* 487 U.S. at 363. However, each jurisdiction advanced arguments in which its operating utility would receive little or no higher-cost Grand Gulf power and correspondingly greater benefits of the MSU system's lower-cost capacity. *See MP&L,* 487 U.S. at 360-61. New Orleans argued that NOPSI should be allocated no more than 9% of Grand Gulf

[10]*E.g.,* Brief on Exceptions of the City of New Orleans, Louisiana, pp. 18-36 (March 5, 1984), *Middle South Energy, Inc.,* FERC Docket No. ER82-616-000; Brief on Exceptions of the City of New Orleans, Louisiana, pp. 24-25, 30-50 (March 6, 1985), *Middle South Services, Inc.,* FERC Docket No. ER82-483-000.

and should receive proportionately more low-cost coal power. New Orleans made over 1,000 pages of submissions in support of its claims.

FERC's Opinions 234 And 234-A. After three years of proceedings, FERC issued its final decision in FERC Opinions 234 and 234-A. FERC decided two major issues.

First, FERC established the "just and reasonable" wholesale rates that NOPSI and each MSU operating company "will pay to MSE" for Grand Gulf power. 31 FERC at 61,655-57. FERC ruled on the objections that New Orleans and other intervenors had raised to the inclusion of certain expenses in MSE's rates and to the rate of return that had been proposed. *See, e.g.,* 26 FERC at 65,124-49; 31 FERC at 61,657-66. Because no one challenged the testimony and findings that Grand Gulf was reasonably and "prudently" planned, constructed, and completed to meet the needs of the MSU System "as a whole" (*see* p. 7 n.9, *supra*), FERC established wholesale rates that would allow MSE to "recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies." *MP&L,* 487 U.S. at 375.

Second, FERC allocated "the costs of Grand Gulf capacity and energy" among the "four operating companies and their customers." 31 FERC at 61,633. Due to the unforeseen developments occurring since the MSU companies had agreed to the proposed allocations in January of 1980, FERC found that UPSA and the 1982 System Agreement would not, as filed, result in wholesale rates that were "just, reasonable, and nondiscriminatory" and that the MSU operating companies must be required to "share the cost of the system's investment in nuclear energy in proportion to their relative demand for energy generated by the system as a whole." *MP&L,* 487 U.S. at 364. To achieve this allocation,

FERC substantially approved the 1982 System Agreement, but changed the allocation percentages in UPSA, as follows:

	UPSA as filed	Allocation under Opinion No. 234
AP&L	0%	36%
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%

In short, although 10% of Grand Gulf had previously been sold off-system in Mississippi,[11] FERC proportionately allocated 100% of the system's remaining nuclear investment among the four MSU operating companies.

FERC's Rejection Of New Orleans's Arguments. FERC thus explicitly rejected New Orleans's arguments that NOPSI should receive a Grand Gulf allocation of 9% and correspondingly greater benefits from lower-cost coal power. In particular, New Orleans had urged FERC to adopt ALJ Head's proposal under which the costs of Grand Gulf *alone* would be allocated among the MSU companies based on their relative shares of system demand. Because NOPSI's approximate share of the system's peak demand is 9%, this method would have given NOPSI a 9% Grand Gulf allocation and, the Council claimed, would have allowed NOPSI to obtain more lower-cost coal capacity.[12]

[11]MSE had previously sold an undivided 10% interest in the plant to some unaffiliated Mississippi utilities. *See* 31 FERC at 61,668 n.3. FERC also made it explicit that, in that event of future such off-system sales of Grand Gulf, FERC would determine the ratemaking consequences of those transactions for the MSU operating companies and their customers. In that event, FERC stated that no "gains or losses" could be reflected in MSE's rates unless future filings were first made with FERC and FERC approved. 26 FERC at 65,148-49, *aff'd.* 31 FERC at 61,666.

[12]*See, e.g.*, Brief on Exceptions of the City of New Orleans, Louisiana, p. 48 (March 6, 1985), *Middle South Services, Inc.*, FERC Docket No. ER82-483-000.

FERC flatly rejected New Orleans's proposal. *See, e.g.*, 31 FERC at 61,651-54. FERC found that the disparity in production costs had resulted from the "unforeseen" increases in the capacity costs of all the system's post-1980 nuclear facilities (not just Grand Gulf), that *each* of the facilities had been built to serve the system as a whole, and that the establishment of "just, reasonable, and nondiscriminatory" rates required that each MSU operating company bear its proportionate shares of the system's *entire* nuclear investment.[13] Because NOPSI had no nuclear plant (*see* p. 6 n.8, *supra*), a 17% Grand Gulf investment was required to give NOPSI its proportionate 9% share of the system's nuclear investment. *See* Cert. App. 5A-6A n.3; J.A. 14-15 n.3.[14]

New Orleans also made a related argument that would not have affected NOPSI's Grand Gulf allocation, but that proceeded from the City's allegation that NOPSI had too little coal capacity and higher non-nuclear generation costs than the other MSU companies. In particular, New Orleans claimed that if FERC was going to modify the Unit Power Sales Agreement to equalize nuclear capacity costs among the MSU companies (as FERC, of course, did), then FERC should also take the additional step of

[13]For this reason, FERC rejected the arguments of Arkansas and Mississippi parties that Grand Gulf allocations should be based on (1) the needs of individual MSU companies for additional capacity (*see MP&L*, 487 U.S. at 364; 32 FERC at 61,958); (2) representations that operating company officials had made to state and local officials (*see MP&L*, 487 U.S. at 376-77 n.14); or (3) the MSU companies' agreed-upon allocations (*see* 31 FERC at 61,643-44).

[14]Indeed, rather than give NOPSI a share of Grand Gulf that was disproportionate to its size—as the Council contended—FERC found that a 17% Grand Gulf allocation actually gave NOPSI (due to rounding) *lower* nuclear capacity costs per megawatt of its average peak demand than any of the other MSU operating companies (41 FERC at 61,616):

	AP&L	LP&L	MP&L	NOPSI
Nuclear Costs per Megawatt of Average Demand ($ Thousands)	816	822	806	751

modifying the 1982 System Agreement to equalize all other production costs as well. FERC rejected this proposal on the ground that it was unnecessary to achieve just, reasonable, and nondiscriminatory rates.[15] Contrary to New Orleans's allegations, FERC found that "the overall production costs of all generation facilities other than nuclear were roughly comparable" (41 FERC at 61,618) and that equalizing nuclear investment costs alone would "ensure approximate equalization of costs responsibility on a per unit of demand basis." *Id.* at 61,617; *see* 32 FERC at 61,959-61.

Subsequent FERC And Appellate Proceedings. The New Orleans, Arkansas, and Mississippi parties each appealed FERC's decision in Opinions 234 and 234-A, and each reiterated the arguments that FERC had rejected. In 1987, the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed FERC's jurisdictional holdings. *Mississippi Industries* v. *FERC*, 808 F.2d 1525, 1539-53 (D.C. Cir.), *cert. denied*, 484 U.S. 985 (1987). However, the Court of Appeals held that FERC had not adequately explained its reasons for ordering equalization of the system's nuclear investment costs, and remanded the case to FERC for further proceedings. *Id.*, 822 F.2d 1104, 1105 (D.C. Cir. 1987); *see id.*, 808 F.2d at 1568-69 (Bork, J., dissenting in part). *See MP&L*, 487 U.S. at 364.

On remand, New Orleans reiterated the same claims that it made in 1985. FERC again rejected New Orleans's claims and reaffirmed the allocation that it had ordered. 41 FERC at 61,613-17, 61,620-23; 42 FERC at 61,624-26. New Orleans again appealed these FERC opinions to the D.C. Circuit. The Court of Appeals rejected New Orleans's claims on the merits, and this Court denied certiorari last term. *City of New Orleans* v. *FERC*,

[15]FERC agreed with New Orleans that it had jurisdiction to order full production cost equalization—irrespective of its impact on state utility commissions' jurisdiction over non-nuclear costs. 31 FERC at 61,644-61, 645; *see* 30 FERC at 65,148-51, 65,165.

875 F.2d 903 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990). Accordingly, the FERC orders are final and are not subject to further review.

B. The Council's Retail Rate Proceedings And Its Grand Gulf Disallowance Order.

On May 17, 1985, NOPSI filed for the retail rate increase required to recover the Grand Gulf expenses that FERC had ordered NOPSI to begin incurring on July 1, 1985. The Council did not grant this request, but on October 10, 1985, the Council instituted a prudence investigation "for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1 expenses should be assumed by shareholders, rather than being passed through to its retail ratepayers." Resolution No. R-85-636; *see* J.A. 55. These actions led NOPSI to file two sequential suits in federal court (*NOPSI I*[16] and *NOPSI II*[17]), which were each ultimately dismissed on procedural grounds.

In March of 1986, following an initial decision in NOPSI's favor in *NOPSI I*, the Council agreed to enter a retail rate order as a partial "settlement" of the pending dispute. Resolution No. R-86-112 (March 20, 1986). This retail rate order finally resolved all non-Grand Gulf rate issues. It further allowed NOPSI to put into effect retail rate schedules in which NOPSI would ultimately recover all but $51.2 million of its Grand Gulf expenses on a phased-in basis.[18] In particular, under the retail schedules,

[16]*NOPSI* v. *Council of New Orleans*, 782 F.2d 1236 (5th Cir. Feb. 14, 1986) (reversing District Court's dismissal order and remanding for decision of federal preemption claims), *modified on reconsideration*, 798 F.2d 858 (5th Cir. Sept. 2, 1986) (affirming District Court's dismissal on abstention grounds).

[17]*NOPSI* v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987) (affirming dismissal on ripeness grounds).

[18]In order to obtain interim rate relief and avoid insolvency, NOPSI agreed to have its shareholders absorb $51.2 million of these Grand Gulf expenses.

NOPSI would defer recovery of some of its Grand Gulf expenses in early years, but ultimately would recover the deferred expenses, plus financing and carrying charges. However, this "settlement" provided that NOPSI's right to recover Grand Gulf expenses was subject to the outcome of the pending prudence investigation. NOPSI, in turn, reserved its rights to challenge the investigation and any order entered in it.

The Council's Order. On February 4, 1988, the Council released a 224-page report in the prudence investigation ("Order"). *See* J.A. 58-245. In this Court's words, this Order "examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent [in 1980], to diversify its supply portfolio." *NOPSI* v. *Council of New Orleans,* 491 U.S. 350, 367 (1989). The Council found NOPSI's conduct to be "negligent" *(id.)* and ordered NOPSI to exclude $135 million from the booked deferred Grand Gulf expenses th[illegible]PSI otherwise would recover from retail ratepayers. That dis[illegible]nce would produce a total loss to NOPSI of approximately $3[illegible]illion (including carrying costs).

This disallowance order rests on the Council's belief that NOPSI has too much higher-cost nuclear capacity relative to its size (*see* J.A. 71-72), and too few benefits from lower-cost coal capacity. J.A. 129-32; 203-08. But the basis for the Order is the Council's finding that if NOPSI management had been "prudent" in 1979 and 1980, NOPSI could have and would have taken steps to avoid these higher costs by entering into certain wholesale purchases and sales of bulk power supplies.

In particular, after rejecting NOPSI's claims that the FERC rate schedules and decisions precluded these transactions and savings,[19] the Council found that a prudent NOPSI would have

[19]The Council rejected what it termed NOPSI's "System Defense": that the System Agreement required NOPSI to rely on the system's
(Footnote continued on next page)

done the following in 1979 and 1980. It would have independently reviewed the MSU system generation and fuel diversification plan. J.A. 70-71, 161-67. It would have concluded that the MSU system was using the wrong method to estimate the costs of Grand Gulf (J.A. 132-34, 171-91) and that Grand Gulf power likely would be 20% more expensive than coal. J.A. 192-97. Finally, the Council found that a prudent NOPSI would, for this reason, have sold off that portion of its then yet-to-be-determined allocation of Grand Gulf "that exceeded a 9% share,"[20] bought equivalent amounts of lower-cost coal-fired capacity, and thereby reduced its future wholesale costs attributable to Grand Gulf by 31%. J.A. 72, 198, 203-08.

In this regard, the Council stated that it assumed that there was a utility who could have "prudently" bought an essentially indeterminate share of Grand Gulf in 1980, despite the Council's finding that it then was imprudent for NOPSI to have such a share. *Compare* J.A. 202, *with* J.A. 155-61 & 197-203. Neither then nor at any time since has the Council identified any utility that would have been willing to buy Grand Gulf high-cost power and sell low-cost coal-fired power.

Finally, the Council's order did not disallow the full 31% of NOPSI's Grand Gulf costs that the Council found to have been

(Footnote continuedfrom previous page)
generation planning and prohibited NOPSI from independently seeking to nullify the system's fuel diversification plan through unilateral off-system purchase and sales. *See* J.A. 120, 161-67 & 171-208. The Council construed the FERC rate schedules to give NOPSI "autonomy" to take these steps in order to discharge its "independent" responsibilities to local ratepayers. J.A. 111-20.

[20]The Council found that in 1979-80 NOPSI should have then sold "substantially all" of its Grand Gulf allocation, but that "based on the expert testimony in the record" NOPSI "might have retained a portion of Grand Gulf I relative to its comparative size within the MSU system —that is, about 9% of the system's Grand Gulf I obligation." J.A. 71-72.

imprudently incurred. The Council found that a disallowance of this magnitude would bankrupt NOPSI and prevent it from making its Grand Gulf payments—contrary to the Council's "intention" (J.A. 72-73, 241-42). The Council "limited" the disallowance to $135 million, which represented the amount that the Council found that NOPSI could absorb without going bankrupt ($150 million), plus a $15 million cushion. J.A. 72-73. *But see* p. 20, *infra.*

C. This Case And The Subsequent State Proceedings.

On February 9, 1988, NOPSI filed this action in federal District Court to enjoin the Council's Order on the ground that it is preempted by FERC's orders under the Federal Power Act. The District Court abstained—in a decision affirmed by the Fifth Circuit—on the ground that the doctrines of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger* v. *Harris*, 401 U.S. 37 (1971), each required NOPSI to litigate its federal claims exclusively in pending parallel state court proceedings.

This Court reversed. First, it held that NOPSI had raised two federal claims that could be maintained on remand without violating *Burford*'s rule against federal court review of "essentially local" regulatory decisions. The District Court could determine that the Council's retail rate order is "facially preempted by FERC's allocative decree" because that required "no inquiry beyond the four corners of the Council's retail rate order." *NOPSI*, 491 U.S. at 363. The District Court could also find that "the rate order's nominal emphasis on NOPSI's failure in 1979-1980 to diversify its power supply by selling off a portion of its Grand Gulf allocation" was merely a "cover" or a "pretext" for a determination that the Grand Gulf allocation was "unwise." *Id.*

Second, this Court held that *Younger* v. *Harris* does not bar litigation of these two claims because the pending state judicial proceedings are not enforcement actions, but are "no more than a state-court challenge to completed legislative action." *NOPSI*, 491 U.S. at 372-73.

The District Court's Decision on Remand. On remand, NOPSI filed a motion for summary judgment that raised each of the two claims identified by this Court in *NOPSI III*.

First, NOPSI claimed that the Council's Order is "facially preempted" because it was apparent from the four corners of the Order that (1) it barred recovery of FERC-mandated costs contrary to *MP&L* and *Nantahala*, and (2) the Council has not only regulated the same "area" in which FERC exercised jurisdiction but also collaterally attacked FERC's actual and implicit findings. Second, NOPSI alternatively claimed that the Council's Order is a "cover" or "pretext" for a challenge to FERC's allocation because—as the District Court's earlier statements had graphically shown—the Council "assumed" and "pulled out of thin air" the facts that would enable the Council collaterally to attack the FERC allocation on the precise grounds FERC rejected. *See NOPSI*, 491 U.S. at 357 n.2 (quoting District Court).

On January 4, 1990, after the state trial court had issued a decision in the Council's favor on these claims in the pending state cases, the District Court, on its own motion, entered an order that rejected NOPSI's facial claims and that stayed further proceedings on the pretext claims pending completion of all appeals in the parallel state court proceedings.[21] Cert. App. 26A-32A. The District Court held that "[f]acially, the Council's Order

[21]The Council had responded to the state trial court decision by moving to dismiss this federal action on grounds of *res judicata* under 28 U.S.C. § 1738. NOPSI opposed this motion on the ground that the applicable provisions of the Louisiana Civil Code provide that a final judgment of a Louisiana court does not become *res judicata* ("the thing adjudged")—and cannot acquire preclusive effect under 28 U.S.C. § 1738—until "there can be no [further] appeal." La. Civ. Code art. 3556(31); *see* La Code Civ. Proc. art. 1842. Although the District Court did not deny the motion directly, it decided the merits of NOPSI's facial preemption claim. The Fifth Circuit subsequently rejected the Council's full faith and credit claim in reviewing the stay of NOPSI's separate pretext claim (Cert. App. 23A; J.A. 32).

is not preempted by federal law" because the Council did not "question the validity of FERC's allocative decree" or "attempt to regulate interstate utility rates." Cert. App. 26A-27A. The District Court then stayed further proceedings on NOPSI's pretextual preemption claim on the ground that this claim involves no substantial federal questions, but merely substantial evidence review under state law. Cert. App. 27A-32A.

The Fifth Circuit's Decision. The Fifth Circuit affirmed on both grounds. First, although it recognized that "[t]he Council's order prevented NOPSI from recovering, in its retail rates, wholesale costs FERC ordered it to incur as a result of its participation in [Grand Gulf 1]" (Cert. App. 2A; J.A. 11), the Fifth Circuit held that the Council's Order is not "facially preempted" under *MP&L* and *Nantahala*. Cert. App. 15A-18A; J.A. 24-27.

The Fifth Circuit stated that *MP&L* and *Nantahala* "reaffirmed the well-established principle that if FERC has jurisdiction over a subject, states cannot have jurisdiction over it." Cert. App. 16A; J.A. 24. However, the Fifth Circuit concluded that *MP&L* and *Nantahala* "established" only that "FERC had jurisdiction to determine whether [NOPSI and the other MSU] utilities acted prudently in deciding to participate in the Grand Gulf venture" initially (Cert. App. 16A; J.A. 24-25), and that *MP&L* and *Nantahala* had not decided a different "variation" of this question that this case presents: "whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." Cert. App. 16A; J.A. 25.

In deciding this question, the Fifth Circuit stated that "it is plain that FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses" and that the Fifth Circuit had to "assume" that FERC lacks this jurisdiction. Cert. App. 16A-17A; J.A. 25-26. Otherwise, the court stated, FERC

could preempt the states from exercising what the Fifth Circuit regarded as their "traditional[ ]" regulatory authority and could achieve "the result Justice Brennan feared" in his dissenting opinion in *MP&L*: "that is, to 'divest states of authority to determine the prudence of costs incurred by retail utilities whenever those utilities belong to an interstate pool.' " Cert. App. 17A; J.A. 26.

The Fifth Circuit concluded that Congress had not expressed a "clear and manifest" purpose to confer this jurisdiction upon FERC. Cert. App. 17A; J.A. 26. Accordingly, the Fifth Circuit held that it is the states, and not FERC, that have exclusive jurisdiction to determine the "prudence" of a utility's "failure" to "minimize its losses" by "diversify[ing] its supply portfolio" during construction of a system plant. Cert. App. 15A-16A; J.A. 24-25. The Fifth Circuit believed that this view was supported by this Court's earlier *abstention* opinion in this case and was "analogous" to *Nantahala*'s statement that wholesale rate increases need not result in retail rate increases when the utility has achieved "cost" savings in "other areas." Cert. App. 17A-18A; J.A. 26.

Second, the Fifth Circuit also upheld the District Court's decision to stay the "pretextual" preemption claim on the ground that it does not present a "substantial federal question[ ]," but involves only sufficiency of the evidence review under state law. Cert. App. 20A-22A; J.A. 29-31.

The Subsequent State Court Proceedings. After the Fifth Circuit issued its decision, an intermediate appellate court in Louisiana (the Court of Appeal for the Fourth Circuit) entered a decision in the parallel state court proceeding.[22] It rejected

[22] *Alliance for Affordable Energy, Inc.* v. *Council of New Orleans*, 578 So. 2d 949 (La. Ct. App. 4th Cir. 1991); *see* Petitioner's Supplemental Filing Pursuant to Rule 15.7 (filed April 6, 1991).

NOPSI's "facial preemption" claims on the ground that the decision of the Fifth Circuit (and this Court's earlier abstention decision) are *res judicata* on this issue unless and until reversed by this Court. 578 So. 2d at 965-66. The court upheld the Council's findings of imprudence on the ground that NOPSI had not "carried its burden" of disproving the critical facts that the Council had assumed. 578 So. 2d at 958-64.

The Louisiana Court of Appeal further held that the Council had erred in mitigating the prudence disallowance to prevent NOPSI's bankruptcy, and the court ordered the disallowance of an additional $290.38 million of NOPSI's FERC-mandated expenses. 578 So. 2d at 974. Unless reversed by the Louisiana Supreme Court,[23] this decision would increase the prudence disallowance that is before this Court from $135 million (plus carrying charges) to $425.38 million (plus carrying charges). Such a disallowance would render NOPSI insolvent.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision is contrary to the terms of the Federal Power Act and to this Court's explicit holdings in *MP&L, Nantahala,* and numerous prior preemption decisions. They each establish that FERC has exclusive jurisdiction to determine a utility's "prudence" while construction of a wholesale generating facility is "underway" (Cert. App. 16A; J.A. 25) and that states are thus preempted from doing what the Council concededly has done: preventing a utility from recovering in its retail

[23]NOPSI and the Council have sought discretionary review of this decision in the Louisiana Supreme Court. The applications are limited to (1) the state law issues raised by the Court's $135 million disallowance (which NOPSI raises), and (2) the issues raised by the intermediate appellate court's decision to increase the disallowance (which NOPSI and the Council raise). NOPSI has not sought Louisiana Supreme Court review of the threshold facial preemption claim because the Fifth Circuit's decision is *res judicata* in the state case. *See* Petition, pp. 10-11 & n.8.

rates—and thereby "trapping"—the Grand Gulf costs that FERC found "just and reasonable" and ordered the utility to incur.

The Federal Power Act establishes a uniform and orderly procedure in which a neutral federal forum—FERC—protects the legitimate interests of states and retail ratemaking bodies in assuring that wholesale power rates are "just, reasonable, and nondiscriminatory" and do not impose "excessive" or unwarranted costs on retail ratepayers. Contrary to the Fifth Circuit's holding, this grant of jurisdiction requires that FERC examine the reasonableness of decisions made by a utility after construction of a wholesale generating facility was "underway" and to exclude any imprudently incurred expenses from wholesale rates. Indeed, because it is these utility decisions that principally determine the utility's costs, FERC routinely exercises jurisdiction to decide the very types of prudence claims that the Council has asserted.

MP&L, Nantahala, and decades of this Court's prior preemption decisions recognize that FERC has exclusive jurisdiction to make all such prudence determinations. Indeed, it was the need to "enforce" FERC's "exclusive jurisdiction" over all elements of wholesale ratemaking that led this Court to develop the "filed rate doctrine" and to hold that states "setting retail rates must allow . . . costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala,* 476 U.S. at 962-67.

MP&L applied this principle to the very Grand Gulf costs at issue. It held that states may not do what the Council has done: "enter an order 'trapping' the costs [an MSU operating company] is mandated to pay under the FERC order allocating Grand Gulf power" or even "undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *MP&L,* 487 U.S. at 372. Indeed, contrary to the Fifth Circuit's holding, *MP&L* involved prudence challenges to conduct occurring during construction of Grand Gulf, and *MP&L* established that the Coun-

cil's prudence claims are matters that "FERC easily could have considered" in setting Grand Gulf rates and in allocating its power among the four MSU operating companies. *Id.* at 375. As Justice Scalia stated, *MP&L* established FERC's exclusive jurisdiction over any and all such prudence claims. *Id.* at 377-83 (Scalia, J., concurring).

Further, the Council's Order has not merely decided claims that could be presented to FERC. It has collaterally attacked FERC's determinations. Most fundamentally, the linchpin of the Council's Order is the Council's *rejection* of FERC's finding that MSU companies "prudently" believed in 1980 that Grand Gulf would "produce power for a total cost . . . which would be less than existing alternatives." *MP&L*, 487 U.S. at 363, *quoting* 26 FERC at 65,112-13. As the New Hampshire Supreme Court has stated, a holding that allows states to review the very matters decided by FERC—and bar FERC-mandated costs on such grounds—defeats the "federal objective of providing orderly and streamlined procedures for approval of wholesale transactions." *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 830, 498 A.2d 696, 702 (1985).

ARGUMENT

The Fifth Circuit's "facial preemption" holding creates an exception to FERC's jurisdiction that would swallow the rule. It is also an exception that is contrary to common sense.

The Fifth Circuit has held that FERC's jurisdiction over bulk power supply arrangements is limited to the initial decisions to "participate" in the construction of wholesale generating facilities. Cert. App. 16A; J.A. 24-25. Accordingly, the Fifth Circuit has held that it is the states, not FERC, that have exclusive jurisdiction to determine the prudence of a participating utility's conduct once construction of the facility is "underway." Cert. App. 16A-18A; J.A. 25-27. Under this holding, each state served by an integrated multistate power system may do what this Court held to be preempted in *MP&L*, *Nantahala*, and numerous prior

decisions—relitigate the reasonableness of FERC-approved wholesale rates and allocations and "trap" FERC-mandated costs.

The Fifth Circuit's holding is erroneous. It is contrary to the plain terms of the Act and to FERC's consistent interpretation of them. *See* Part I, *infra*. It is contrary to *MP&L*, *Nantahala*, and numerous prior preemption decisions of this Court. *See* Part II, *infra*. Finally, because the Council has relitigated the very matters that were before FERC—and collaterally attacked its actual and implicit findings—it could not be clearer that its Order has nullified FERC's determinations for the only purpose for which they matter. *See* Part III, *infra*.

I. The Fifth Circuit's Holding Is Contrary To The Terms Of The Federal Power Act And To FERC's Consistent Interpretation Of Them.

Congress enacted the Federal Power Act because it recognized that the production and transmission of bulk supplies of electrical power are "particularly likely to affect more than one State," and that "uncontrolled [State] regulation" can "patently interfere with broader national interests."[24] State regulation would mean that the reasonableness of wholesale power rates and the underlying interstate cost allocations would be litigated and relitigated

[24] *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *see FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). Although the Federal Power Act was enacted to fill the "gap" created by *Attleboro*'s holding that states could not regulate such transactions, Congress could have filled the "gap" by authorizing state regulation. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427-33 (1946). Instead, Congress codified *Attleboro*'s concerns that parochial state regulation would burden interstate commerce and gave FERC jurisdiction over all wholesale power transactions. Indeed, Congress contemporaneously found, in the Public Utility Holding Company Act of 1935, that wholesale power transactions in integrated multistate systems "are not susceptible of effective control by any State." 15 U.S.C. § 79a(a).

in multiple state forums and that inconsistent state determinations could impair interstate commerce vital to the nation.[25]

The Federal Power Act prevents this interference with commerce by centralizing all these determinations in a single neutral federal forum—FERC—and by establishing a uniform, orderly procedure in which all legitimate state interests can be raised and protected.[26] Under Section 205 of the Act, each utility must file with FERC a "rate schedule" that contains the utility's charges for wholesale sales of electricity, and all contracts and arrangements affecting these wholesale rates. FERC is required to assure that these rate schedules are "just and reasonable" and nondiscriminatory. Federal Power Act, §§ 205 & 206; Cert. App. 37A-43A.

Because these determinations directly affect retail rates, the Act gives states, municipalities, and retail ratemaking bodies explicit rights to participate in FERC proceedings, to file complaints with FERC, and otherwise to urge FERC to prevent the imposition of excessive or unwarranted costs on retail ratepayers.

[25]*Arkansas Elec. Coop. Corp.*, 461 U.S. at 377; *see Attleboro Steam & Elec.*, 273 U.S. at 90 (each state would then protect its "respective local interests"); *Massachusetts* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (each state would then seek to "benefit[ ] its residents to the detriment of its neighbors"); *cf. New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982).

[26]The Act gives FERC exclusive jurisdiction to regulate the "transmission" and the "sale of electric energy at wholesale in interstate commerce." Federal Power Act, § 201(b); Cert. App. 36A. Section 201(d) of the Act defines "[s]ale of electric energy at wholesale" to mean "sale of electric energy to any person for resale": that is, sales to or exchanges with a utility that will, in turn, resell the electricity to retail customers or to utilities serving such customers. *See* Cert. App. 37A.

As this Court has held, the Act thus draws a "bright line easily ascertained" to divide state and federal authority. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). FERC is given "plenary jurisdiction" to regulate all aspects of wholesale transactions, regardless of the impact of state regulation. *See id.*

Federal Power Act, §§ 205, 206, 306; Cert. App. 37A-44A. FERC is authorized to "balanc[e] . . . the investor and the consumer interests" (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)) and to assure that wholesale power supply arrangements do not result in "excessive prices" to any class of power consumers. *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952).

Contrary to the Fifth Circuit's holding, this grant of jurisdiction requires FERC to make determinations of the "prudence" of not just a utility's *initial* decision to participate in building a wholesale generating plant, but also of the capacity planning and other decisions made by power pools and the participating utilities while construction of the plant is "underway." The reality is that it is the decisions made during construction of a generating facility that principally determine utilities' costs.[27] FERC simply cannot assure that wholesale rates are "just, reasonable, and nondiscriminatory" unless it can assure that these decisions were made in good faith, were reasonable when they were made, and thus do not result in the imposition of excessive or unwarranted rates on power consumers.

The Fifth Circuit is also in error in stating that FERC has not "asserted" jurisdiction to decide these prudence claims. *See* Cert. App. 16A; J.A. 25. Even the Council's Order acknowledges this point, for the Council states that it applied "the same standard of

[27]Wholesale generating facilities often require a decade, or more, to build. During these time periods, there are unavoidably changes that can profoundly affect capacity planning decisions. There can be changes in a utility system's anticipated future demand for electricity. There can be changes in the relative costs of alternative generating facilities (and the fuels used in them). There can be changes affecting a utility's ability to obtain needed capacity by entering into long-term contracts with other utilities. The way in which a utility system responds to these changing conditions determines its costs—and its customers' rates.

prudence" that FERC "has adopted" in regulating wholesale rates and power supply arrangements.[28]

Indeed, when the prudence claims are raised,[29] FERC exercises jurisdiction to decide any and all claims that a utility behaved imprudently after construction of a plant was "underway." FERC decides claims that the utility's conduct in managing construction of the plant was wasteful or inefficient.[30] FERC decides claims that a prudent utility would have minimized its losses by cancelling a plant[31] or by cancelling it at an earlier point in time.[32] FERC further decides the very kinds of prudence claims that the Council has raised: that utilities should have recognized the risks created by events like the Three Mile Island accident and sought to "minimize their losses" by selling off their entitlements to power from a plant and/or obtaining substitute power from

[28]*See* J.A. 92 & n.25, *quoting New England Power Co.*, 31 FERC ¶ 61,047 at 61,084 (1985) (FERC reviews "prudence" of "utility's actions and the costs resulting therefrom" by asking what "a reasonable utility management" would have done "in good faith, under the same circumstances, and at the relevant point in time").

[29]Under FERC's practice, an investment is presumed to be prudent unless a party raises prudence objections or a serious doubt about the prudence of an investment is otherwise raised. *See, e.g., Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 at 61,645 (1980).

[30]*Kansas Gas & Electric Co.*, 49 FERC ¶ 61,295 at 62,117 (1989) (disallowing some of the costs of construction of the plant on grounds of imprudence); *Union Electric Co.*, 40 FERC ¶ 61,046 (1987) (same), *rev'd on other grounds*, 890 F.2d 1193 (D.C. Cir. 1989).

[31]*Kansas Gas & Electric Co.*, 39 FERC ¶ 63,013 at 65,065-69 (1987), *aff'd*, 49 FERC ¶ 61,295 (1989) (rejecting claims that it was imprudent to continue construction of plant, rather than to cancel it or reduce its size); *Union Electric Co.*, 35 FERC ¶ 63,076 at 65,238-41 (1986).

[32]*New England Power Co.*, 32 FERC ¶ 61,112 (1985) (rejecting claims it was imprudent to fail to minimize losses by ending investment in cancelled Pilgrim II plant earlier), *aff'd sub nom., Violet* v. *FERC*, 800 F.2d 280 (1st Cir. 1986); *see Eastern Edison Co.* v. *Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1984) (recognizing that a state utility commission can raise such prudence claims before FERC).

alternative sources.[33] FERC also exercises jurisdiction to decide prudence claims that are the converse of those presented here: that a utility was imprudent in selling off or cancelling a nuclear plant and deciding to obtain capacity from alternative coal sources instead.[34]

FERC makes these determinations in setting wholesale rates and in allocating costs both among participating utilities and between ratepayers and shareholders. Indeed, FERC has exercised jurisdiction to review the "prudence of [a utility's] action in keeping, rather than selling, [a nuclear] plant" even before the utility actually seeks to recover its costs in wholesale rates.[35]

Finally, there is no substance to the Council's efforts to distinguish these cases and to avoid the plain terms of the Federal Power Act. FERC has jurisdiction to review the prudence of any

[33]*Connecticut Light & Power Co.*, 43 FERC ¶ 63,029 at 65,228, 65,231 (1988), *aff'd* 48 FERC ¶ 61,139 (1989) (deciding claims that prudent utility would have sold off entitlements to Millstone 3 and obtained power from alternate sources such as Canadian electricity and cogeneration); *Arizona Public Service Co.*, 25 FERC ¶ 63,025 at 63,055-57 (1983), *aff'd*, 27 FERC ¶ 61,185 (1984) (deciding claims that a prudent utility should sell-off part of plant); *see AEP Generating Co.*, 35 FERC ¶ 61,226 at 61,549 (1986) & *AEP Generating Co. and Kentucky Power Co.*, 38 FERC ¶ 61,243 (1988) (reviewing prudence of participating utility's decision to purchase output of system plant "in light of the availability of alternate power sources").

[34]*Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (rejecting claim that it was imprudent to cancel the Tyrone nuclear plant and to obtain coal-fired power instead), *aff'd sub nom., South Dakota Public Utilities Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982); *see Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) (recognizing FERC's exclusive jurisdiction "to determine the reasonableness and prudence of the Tyrone loss"); *Northern States Power Co.* v. *Minnesota Public Utilities Comm'n*, 344 N.W.2d 374 (Minn. 1984) (same).

[35]*Arizona Public Service Company*, 27 FERC ¶ 61,185 at 61,350 (1984); *Arizona Public Service Company*, 21 FERC ¶ 63,007 (1982), *aff'd*, 23 FERC ¶ 61,419 (1983.

decision or action of a wholesale utility that affects the utility's costs, be it the construction or cancellation of a generating facility or the acquisition or sale of generating capacity through contracts.[36]

II. The Fifth Circuit's Holding Is Contrary to *MP&L*, *Nantahala*, And Their Numerous Precursors.

For these reasons, *MP&L*, *Nantahala*, and this Court's other prior preemption decisions each reject the Fifth Circuit's holding. They establish that FERC has exclusive jurisdiction to make all determinations required to assure that FERC rate schedules are "just, reasonable, and nondiscriminatory." Indeed, decades of prior decisions of this Court hold that states are preempted from

[36]In its Opposition to the petition for certiorari, the Council argued (pp. 3-4 & 15-17) that FERC has jurisdiction over decisions to "construct" or "cancel" a generating plant, but *not* over the utility's failure to pursue the "risk-reducing" measures of selling off an interest in the plant and buying substitute power from alternative sources. This claim is baseless. The prudence of decisions to contract with third parties to buy or sell capacity, like the prudence of decision to complete, or cancel a plant, is a matter that determines a utility's costs and the resulting rates. Thus, review of the prudence of *each* is encompassed within FERC's jurisdiction to assure that wholesale rates, and contracts affecting them, are just, reasonable, and nondiscriminatory.

Indeed, the Council's proposed distinction is refuted by the terms of its order. The Order states, correctly, that building plants and entering into contracts with unaffiliated utilities are simply alternative means by which utilities acquire the generating capacity they need to serve customers. J.A. 204. The FERC rate schedules so provide as well. *See* § 4.01 of 1973 System Agreement (J.A. 40-41) (equating construction of plant and acquiring capacity by "firm contract").

Finally, the Council is incorrect in asserting that the Act gives FERC jurisdiction over "construction" or "cancellation" of plants as such. To the contrary, FERC has no authority over "facilities used for the generation of electric energy" except as "specifically provided" elsewhere in the Act. Federal Power Act, §§ 201(b)(1) & 205; Cert. App. 36A. FERC thus can consider construction decisions only in connection with assuring the reasonableness of rates. *See MP&L*, 487 U.S. at 382-83 (Scalia, J., concurring).

taking any action, no matter how it is labeled,[37] that would have the *effect* of changing FERC-regulated rates (*Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981)), of altering FERC's interstate "allocations of costs" (*Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981)), or of imposing sanctions on conduct that federal agencies have jurisdiction to "declare unlawful or unreasonable." *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324-27 (1981).

In particular, the Court developed the "filed rate doctrine" to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*, 476 U.S. at 966. Because "the 'filed rate' doctrine . . . holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates," the doctrine assures that FERC alone determines the reasonableness of bulk power supply arrangements. *Nantahala*, 476 U.S. at 962-67.

Nantahala and *MP&L* held that states are categorically preempted from doing what the Council's Order concededly does: preventing a utility from recovering, in retail rates, costs that FERC has ordered the utility to incur. Cert. App. 2A; J.A. 11. *Nantahala* prohibits this "trapping" of costs. It holds that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, 476 U.S. at 965.

[37]On this basis, states have been held to be preempted from applying their tax laws, contract remedies, tort laws, and anti-fraud provisions as well as their utility laws in ways that have the effect of intruding, directly or indirectly, on federal authority. *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963) (state utility laws); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981) (state tax laws); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (state contract remedies); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (state tort laws); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) (state anti-fraud provisions); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) (state utility laws.)

MP&L applied this principle to the very Grand Gulf costs at issue. It holds that a retail ratemaking body may not do what the Council has done: "bar regulated utilities from passing through to retail customers FERC-mandated wholesale rates." *MP&L*, 487 U.S. at 372.

The Fifth Circuit recognized the holdings of *MP&L*, *Nantahala*, and their precursors. Cert. App. 10A-15A; J.A. 19-24. However, it attempted to distinguish them on three separate grounds. Each is erroneous.

A. *Nantahala* And *MP&L* Establish FERC's Exclusive Jurisdiction Over Claims Of "Imprudence" After Plant Construction Has Begun.

First, the Fifth Circuit stated that *Nantahala* and *MP&L* involved the prudence of initial decisions to participate in a wholesale generating plant, not the prudence of decisions made after construction of the plant had begun. Cert. App. 15A-16A; J.A. 24-25. However, the Fifth Circuit has misread these decisions, and its holding cannot be the law.

Nantahala did not involve the prudence of an initial decision to participate in a plant. Rather, it arose from a wholesale transaction in which a North Carolina utility (Nantahala) and its affiliate (Tapoco) each transferred the output from previously-constructed generating facilities to TVA in exchange for fixed entitlements of TVA power. The FERC rate schedules and orders prescribed a particular allocation of this lower-cost entitlements power between Nantahala and Tapoco. However, the North Carolina Utilities Commission ("NCUC") refused to include the resulting costs in Nantahala's retail rates. It found that if Nantahala had not imprudently acted to benefit its shareholder (Alcoa), it would have avoided the earlier transactions through a "roll-in" with Tapoco in which the "various sources of power available to

Tapoco and Nantahala" would be "pooled" and "then allocated . . . according to [relative] demand." *Nantahala*, 476 U.S. at 959-60.

In short, the NCUC did exactly what the Council did here: it did not directly alter FERC's wholesale allocations, but it set retail rates "as if" Nantahala had previously engaged in wholesale transactions that gave it a different allocation of power than FERC had ordered.[38] This Court reversed that order. It held that FERC had exclusive jurisdiction to decide these prudence claims. It held that a state thus "may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate" and that this principle is fully applicable to costs that result from FERC's interstate power allocations. *Nantahala*, 476 U.S. at 970-71.

MP&L is even more clearly dispositive. There, this Court was reviewing a Mississippi supreme court decision that ordered the Mississippi Public Service Commission ("PSC") to conduct an investigation of the prudence of the same Grand Gulf costs at issue here. As the Council correctly stated in its *amicus curiae* brief in *MP&L*,[39] the Mississippi court's holding would have al-

[38]In *Nantahala* the NCUC set retail rates as if wholesale power costs that FERC allocated to Nantahala had been allocated to its affiliate Tapoco. Here, the Council has set NOPSI's retail rates as if over $135 million of the Grand Gulf costs that FERC allocated to NOPSI had been allocated, instead, to the Council's hypothetical "sucker" utility. *See NOPSI*, 491 U.S. at 357 n.2.

[39]Because the Council had then completed the same kind of prudence investigation that the Mississippi supreme court had ordered, the Council filed *amicus curiae* briefs in *MP&L* that argued that at least some state investigations of the prudence of the Grand Gulf 1 expenses of MSU operating companies are not preempted by the Federal Power Act and that the Court should allow the Mississippi prudence investigation to proceed. Brief Of Council Of City Of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, No. 86-1970, p. 10 (filed January 22, 1988).

lowed the entry of an order, on remand, that disallowed some, or all, of these costs under the same theory that the Council's Order adopted.

Indeed, contrary to the Fifth Circuit's holding, the Mississippi supreme court had directed a prudence investigation that focused solely on decisions made while construction of the plant was "underway." The Mississippi supreme court did not question the prudence of the initial 1974 decision to build Grand Gulf (or of MP&L's earlier decision to participate in the MSU power pool). Rather, the Mississippi court stated that it had become "obvious" by "the early 1980s, that both the cost and demand projections related to Grand Gulf were terribly incorrect," and it ordered a prudence "review" to determine "whether MP&L, MSEI and MSU acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power . . . and the sudden escalation of costs." *Mississippi ex rel. Pittman* v. *Mississippi Public Service Commission,* 506 So. 2d 978, 986, 987 (Miss. 1987); *see MP&L,* 487 U.S. at 368.

If this Mississippi PSC prudence investigation had proceeded, it would have addressed whether MP&L or the other MSU companies had been imprudent in the early 1980s—while construction of the plant was underway—by failing to recognize the magnitude of the risks created by Three Mile Island and by failing to minimize their losses by cancelling or selling-off Grand Gulf and by relying on alternative power sources instead. The Mississippi PSC would then have decided the extent to which the Grand Gulf costs should be "trapped" and borne by the utility's shareholders, rather than "passed on to MP&L's retail customers" (*MP&L,* 487 U.S. at 372 n.12)—which is precisely how the Council has described its investigation. *See* p. 13, *supra.*

MP&L held that the Federal Power Act and the Supremacy Clause categorically bar a state from even conducting such a review of "MP&L's managerial prudence," regardless of the form

it took. 487 U.S. at 369. It held that a state retail ratemaking body may not do what the Council concededly did here: "enter an order 'trapping' the costs MP&L [and other MSU operating companies are] mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." *MP&L,* 487 U.S. at 372 & n.12.

In so holding, the Court made it explicit that any and all such "prudence" claims were matters that are within FERC's jurisdiction and that "FERC easily could have considered in determining whether to permit MSE to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf power" among those companies. *MP&L,* 487 U.S. at 375.[40] For example, the Council could have presented its claims that MSE, MSU, or NOPSI could have and should have reduced their costs in 1980 by engaging in the wholesale purchases and wholesale sales that the Council's Order assumes, and that the amount of the forgone "savings" should be borne by NOPSI's shareholders and excluded from rates. However, as this Court recognized in *MP&L,* the reason FERC did not address the prudence of the MSU companies in this respect was because New Orleans and the state parties "failed to raise the matter," not because FERC has not "asserted" this jurisdiction.[41]

As Justice Scalia stated in his concurring opinion, "[a]fter [*MP&L*], the battle will no longer be over who has jurisdiction, FERC or the states." *MP&L,* 487 U.S. at 383 (Scalia, J., concur-

[40]Indeed, the Court cited FERC opinions in which FERC decided state claims that a utility had been imprudent in failing to take certain steps to minimize its risks during construction of a nuclear plant. *See MP&L,* 487 U.S. at 375, *citing New England Power Co.,* 31 FERC ¶ 61,047 at 61081-84 (1985), *aff'd sub nom., Violet* v. *FERC,* 800 F.2d 280 (1st Cir. 1986).

[41]*Compare MP&L,* 487 U.S. at 375 (Opinion for the Court) & *id.* at 379-80 n.* (Scalia, J., concurring) (quoting colloquy with counsel for New Orleans), *with* Cert. App. 15A-16A, J.A. 24-25.

ring). *MP&L* establishes that FERC's jurisdiction is plenary. As Justice Scalia stated, FERC has "jurisdiction" to "determine whether [a power pool] venture was prudent as a whole," "to determine a fair allocation of the cost of the facility among the utilities in the pool," and even "to determine the prudence of a particular utility's [initial] participation in the pool." *MP&L,* 487 U.S. at 378 (Scalia, J., concurring) (emphasis deleted).

B. As In *MP&L* And *Nantahala,* The Prudence Disallowance Does Not Involve "Cost Savings In Other Areas."

Second, the Fifth Circuit sought to distinguish *MP&L* on the ground that the Council's prudence disallowance is "analogous" to the "exception" which this Court recognized in *Nantahala.* Cert. App. 17A-18A; J.A. 26. Specifically, the Fifth Circuit cited *Nantahala's* statements that increases in FERC-mandated wholesale costs need not result in dollar-for-dollar increases in retail rates if the retail utility has experienced "savings in other areas." *Nantahala,* 476 U.S. at 967-68.[42] However, as this Court made explicit in *Nantahala,* "such a divergence between wholesale and retail rates would occur only if costs *other than* those resulting from the purchase of FERC-regulated power or gas were to decrease," such as "costs of transformation and transmission." 476 U.S. at 967-68 (emphasis in original).

That principle is inapposite here for the same reason it was in *MP&L*: the Council's Order finds no such "savings in other areas." Rather, here, as in *MP&L* (*see* 487 U.S. at 365), all non-

[42]The Fifth Circuit stated that "[i]f states may deny [dollar-for-dollar] pass throughs because costs have gone down in other areas, it seems logical that they should be able to deny them because costs would have gone down if the utility had not been imprudent." Cert. App. 18A; J.A. 26. The fallacy of this statement is that the basis of the Council's order is not that a prudent utility would have achieved "cost savings in other areas." Rather, it is that a "prudent" utility would have *avoided* the costs FERC found just and reasonable and ordered the utility to incur.

Grand Gulf revenue requirements, and all available "savings in other areas," were finally determined in a separate retail rate order. *See* p. 13, *supra.* Accordingly, the Council's investigation and Order do precisely what *MP&L* and *Nantahala* forbid: they bar the recovery of the *Grand Gulf* costs that FERC regulates and that FERC found "just and reasonable" and ordered NOPSI to incur. *See* Cert. App. 2A; J.A. 11. Indeed, as explained below, the only way the Council could bar recovery of these costs is by collaterally attacking FERC's determinations and making findings that are inconsistent with FERC's actual and implicit determinations.

C. *MP&L* And *Nantahala* Were Not Overruled By This Court's Subsequent Abstention Opinion In This Case.

Finally, the Fifth Circuit sought to distinguish *MP&L* and *Nantahala* by relying on this Court's earlier abstention opinion in this case. In particular, although this Court's *holding* was that the federal courts erred in refusing to decide NOPSI's facial preemption claim, the Fifth Circuit has relied on the portions of this Court's opinion that indicated that *Younger* v. *Harris* would have required abstention in this case *if* the pending state judicial proceeding had been an enforcement proceeding—*e.g.,* a criminal prosecution for a violation of the rate order. *See* p. 16, *supra.* The Court indicated that such a federal suit could not be maintained because the Council's order is not "flagrantly and patently violative of express constitutional provisions in every clause, sentence, and paragraph." *NOPSI,* 491 U.S. at 366-67; *Younger,* 401 U.S. at 53-54. These latter statements "convinced" the Fifth Circuit "that the [Supreme] Court in *NOPSI III* did not believe that the Council could not regulate NOPSI's activities" in the way it did. Cert. App. 17A; J.A. 26.

The Fifth Circuit's conclusion is inexplicable. As the Fifth Circuit also stated, "[i]t is plain, however, that the [Supreme] Court held only that the [Council's] order was not 'flagrantly' unlawful for *Younger* abstention purposes; it did not hold the facial pre-

emption claim was foreclosed." Cert. App. 10A; J.A. 19. Indeed, the Fifth Circuit recognized that this Court had "reversed" the Fifth Circuit's decision for failing to decide this facial preemption claim. Cert. App. 9A; J.A. 18.

Further, while only this Court can know what it meant in this passage from *NOPSI III,* this Court's language, by its terms, does not even address the NOPSI claim that the Council's Order is preempted on its face by the *orders* FERC entered under the Federal Power Act.[43] Rather, by its terms, the Court's discussion confined any such exception to *Younger* v. *Harris* to a narrow set of claims that are preempted by the Federal Power Act by its own force: *e.g.,* when a state directly regulates wholesale rates. *See, e.g., Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943). In all events, if this Court's abstention discussion had been intended to bar NOPSI's facial preemption claim, it would, as explained above, have overruled *MP&L, Nantahala,* and decades of prior preemption decisions, without saying so and while explicitly declining to decide the merits of the preemption issues. *See NOPSI,* 491 U.S. at 353.

[43]The Fifth Circuit relied on the Court's statement that the Council had disallowed costs because it found the utility had imprudently failed to "diversify its supply portfolio" and that "[n]othing in this is directly or even indirectly foreclosed by the federal statute [*i.e.,* 16 U.S.C. §§ 791-828], the regulations implementing it [*i.e.,* 18 C.F.R. §§ 4-141], or the case law applying it." *NOPSI,* 491 U.S. at 367; *see* Cert. App. 15A, 17A; J.A. 24, 26. By its terms, this statement does no more than reflect the holdings that the Federal Power Act allows states to disallow costs that a utility *voluntarily* incurs in purchasing energy under FERC rate schedules: that is, when (as is not the case here) the purchase was not part of a pooling arrangement, the utility was not both a wholesale and a retailer, and FERC did not *order* the utility to purchase a particular *quantity* of energy at a FERC-approved rate in regulating the wholesale transactions. *See Kentucky W. Va. Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 837 F.2d 600 (3d Cir. 1988); *MP&L,* 487 U.S. at 373-74; *Nantahala,* 476 U.S. at 972-73. By contrast, NOPSI's facial preemption claim here rests on the valid FERC *orders* that require NOPSI to buy 17% of Grand Gulf at FERC-approved rates.

III. The Council's Order Has Relitigated The Very Matters That Were Before FERC And Has Collaterally Attacked FERC's Findings.

Finally, in any case, the Council's Order is precisely the kind of state action that the Federal Power Act must be held to preempt under any reading of *NOPSI III.* As FERC and the Solicitor General have stated,[44] the Council's Order does not merely decide claims that could be presented to FERC. It has relitigated the reasonableness of the "same activit[ies]" that were before FERC (*Kalo Brick,* 450 U.S. at 319) and "collaterally attacked" not only "[t]he reasonableness of rates and agreements regulated by FERC" (*MP&L,* 487 U.S. at 375), but also many of FERC's actual and implicit findings. This epitomizes the evils that the Federal Power Act was intended to prevent, and constitutes an independent ground for holding the Council's Order "invalid on its face." *NOPSI,* 491 U.S. at 363.[45]

A. The Council Findings And Assumptions Are Inconsistent With FERC's Orders In Three Fundamental Respects.

There are three fundamental respects in which the Council has relitigated the very matters that were before FERC and that FERC decided.

[44]Feb. 1991 FERC Amicus Br., pp. 11-17.

[45]The Fifth Circuit did not decide this separate facial preemption claim because the Fifth Circuit concluded, again, that this Court rejected it *sub silentio* in its abstention opinion in this case. Cert. App. 16A n.5; J.A. 25 n.5. However, this Court's abstention opinion explicitly did not consider challenges to the Council's "necessary factual finding[s]" (*NOPSI,* 491 U.S. at 367), but indicated at most that a retail rate order cannot be "flagrantly and patently" unlawful to the extent that the challenges to it depend on examining findings made in over 500 pages of FERC opinions. *Id.*

1. The Council Has Collaterally Attacked The Reasonableness Of NOPSI's 17% Allocation.

First, the Council's Order is a collateral attack on FERC's determination that NOPSI's purchase of 17% of Grand Gulf at FERC-approved rates is "just and reasonable." *MP&L*, 487 U.S. at 375. FERC made these determinations in a proceeding in which FERC had before it (1) all the MSU system's decision-making between 1970 and 1985, (2) all the power sources on the MSU system, and (3) New Orleans's claims that FERC was giving NOPSI too much nuclear investment relative to its size and too little coal.

The Council's Order replows this same ground. The Order, too, is predicated on the premise that NOPSI now has too much nuclear power relative to its size and too little coal—which is the claim FERC rejected.[46] Further, what the Council finds is that NOPSI was imprudent in failing to anticipate that it "would be required [by FERC] to take some portion of Grand Gulf as a matter of system responsibility" and in then seeking to *avoid* the allocations that FERC found "just and reasonable." J.A. 71-72. Finally, and most fundamentally, the Council makes this finding by reviewing the *same* evidence of the MSU system's Grand Gulf decisionmaking between 1970 and 1985 that was before FERC and by making findings that are the *opposite* of FERC's.

The linchpin of the Council's Order is its determination that, if NOPSI had been "prudent" in 1980, it would have concluded that the MSU system's estimates of the likely costs of Grand Gulf and alternative coal power were wrong and that Grand Gulf

[46]Indeed, FERC rejected New Orleans's claim that NOPSI should receive only 9% of Grand Gulf and should not, in any case, receive its proportionate share of the system's nuclear investment costs unless FERC equalized non-nuclear costs (and gave NOPSI more low-cost coal). *See* pp. 10-12, *supra*.

power would be excessively priced relative to coal power. J.A. 132-34 & 171-208. It is for *that* reason that the Council found NOPSI should have sold off 8% of Grand Gulf power and replaced it with equivalent amounts of lower cost coal power. *See* p. 15, *supra*.

However, the same MSU system cost estimates were before FERC (*see* p. 8, *supra*) and FERC found precisely the opposite: that MSU officials were "prudent" in believing that Grand Gulf would "produce power for a total cost (capacity and energy) which would be less than existing alternatives on the system." *MP&L*, 487 U.S. at 363. Under this finding, there was no reason or basis to sell-off any Grand Gulf power and to buy substitute coal-fired power instead.

Further, the Council's Order rests on the ground that NOPSI should not have had more than 9% of Grand Gulf because that, in the Council's view, is the share justified by NOPSI's "relative" size. *See* p. 15 & n. 20, *supra*. However, that is the very claim the Council made to FERC and that FERC rejected in finding that a 17% allocation is "just and reasonable." *See* pp. 10-12, *supra*.

Indeed, the Council's defense of its Order is an admission that it has collaterally attacked FERC's determinations. The Council has defended its Order on the ground that it is not disputing FERC's finding that it is "just and reasonable" and prudent for NOPSI to have *obtained* 17% of Grand Gulf "for resale" to retail customers. Instead, the Council claims that the basis for its Order is that it was "imprudent" for NOPSI to *retain* the power and in fact resell it to retail customers, rather than to sell it off to a hypothetical "sucker" utility. But that is a distinction without a difference, and this Court has held that the preemptive effect of FERC orders cannot be evaded through facile distinctions and "artful pleading." *Kalo Brick*, 450 U.S. at 324.

2. The Council Has Collaterally Attacked The Joint Planning Requirements.

Second, here, as in *MP&L*, the Council has collaterally attacked FERC's determination that "the Middle South companies appropriately approach power planning on a system wide basis" and that the reasonableness of purchases of Grand Gulf power cannot be assessed "in light of local conditions" in any one jurisdiction alone. *MP&L*, 487 U.S. at 376 (citations omitted).

In particular, here, too, the Council does not purport to challenge FERC's finding that the MSU system's retention of a 90% interest in Grand Gulf was a reasonable means of diversifying fuel sources to meet MSU system needs "as a whole." But the Order rests on the premise that NOPSI should have discharged its "independent" obligations to New Orleans ratepayers by unilaterally seeking to diversify *its* "power supply portfolio" in a different way than the MSU system had directed. The Order thus repeatedly excoriates NOPSI for relying on the system's cost estimates—which the Council calls an " 'Ostrich' Policy"—and for not itself replicating the system's capacity planning process, "critically" second guessing the system's decisions, and seeking to nullify them.[47]

However, the Council's findings are preempted on two grounds. First, the FERC rate schedules in effect in 1979 and 1980 required system-wide planning and foreclosed individual MSU operating companies from engaging in the hypothesized off-system wholesale purchases and sales without System approval. *See* pp. 5-6, *supra*. Second, FERC found that the Grand Gulf

[47]J.A. 120, 161-67 & 171-208. The Council's theory is that FERC can find that the MSU system's retention of its 90% interest in Grand Gulf was a reasonable means of fuel diversification for the MSU system as a whole, but the five different state and local ratemaking bodies can revisit this issue and find, based on "local conditions," that individual MSU operating companies should have second-guessed the system's planning process, anticipated FERC's allocation, and sought to nullify both.

planning was an appropriate means of serving the needs of the system as a whole.[48] *See* 32 FERC at 61,958.

3. The Council Has Collaterally Attacked FERC's Cost Allocation Principles.

Finally, the Council's Order *assumes* that NOPSI and its ratepayers would have realized the resulting "savings" if NOPSI had engaged in the hypothesized 1980 wholesale sale of 8% of Grand Gulf and a wholesale purchase of equivalent amounts of lower-cost coal. In particular, the Council assumes FERC would then have allowed NOPSI to avoid 8% of Grand Gulf's costs and to achieve dramatically lower nuclear capacity costs than the other MSU companies. But this assumption, too, is foreclosed by FERC's contrary determination and epitomizes the speculation that the filed rate doctrine forbids.

In its orders, FERC adopted a Grand Gulf allocation that would equalize nuclear investment costs among the MSU companies. It recognized that some of the system's nuclear investment had been sold to Mississippi utilities, but it equalized those nuclear investment costs that remained on the system among the four MSU operating companies. In this regard, FERC *rejected* each and every argument under which any MSU company could have achieved dramatically lower nuclear investment costs relative to its average peak demand. *See* p. 11 & n.13, *supra*.

In particular, FERC rejected a claim of the Arkansas parties that is virtually identical to the claim New Orleans would have made if NOPSI had engaged in the hypothetical wholesale trans-

[48]Indeed, the Council's collateral attack on these binding FERC schedules is especially improper because the Council has *not* challenged NOPSI's initial decision to participate in this power pooling arrangement. Rather, the Council appears to recognize that system-wide planning has led to efficiencies and reductions in "unit costs" that would have been unobtainable by NOPSI or any individual MSU operating company. *See* J.A. 108 (quoting SEC Order to this effect). The Council's theory is that NOPSI can participate in the power pool for some purposes, but selectively "opt out" in light of "local conditions." That theory would destroy integrated power systems.

actions in 1980. The Arkansas parties claimed that AP&L should have no Grand Gulf allocation because it had "independently" acquired sufficient base load coal and nuclear capacity to meet its own needs prior to 1980 and because it had contracted away all its Grand Gulf 1 entitlements to other MSU companies. Indeed, the Arkansas parties claimed that FERC had no jurisdiction to order the "forced purchase" of that percentage of Grand Gulf that was required to give AP&L its fair share of the system's nuclear investment. FERC rejected these arguments and held it is essential that AP&L, like each other MSU operating company, bear its proportionate share of the system's nuclear investment, regardless of the transactions that each had entered into in 1980 or in any years prior to 1985. 32 FERC at 61,957-58; 26 FERC at 65,113-19.

In short, FERC adopted a rule in 1985 in which allegedly "independent" sales and acquisitions of other capacity by an individual MSU company could not reduce its and its ratepayers' proportionate shares of the MSU system's nuclear investment costs. Accordingly, one of the critical assumptions of the Council's Order is that FERC would have departed from these principles in its 1985 order if NOPSI had engaged in the hypothetical transactions in 1980.

As this Court has held, such an assumption is "precisely what the filed rate doctrine [and settled preemption principles] forbid[ ]." *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 579 (1981). "[I]t amounts to nothing less than the award of a retroactive rate [reduction] based on *speculation* about what the Commission might have done had it been faced with the facts of this case." *Id.* at 578-79 (emphasis added).[49] As FERC and the Solicitor General have stated, FERC alone may decide the question of "how the benefits and burdens of [power] sources should be shared between affiliated companies doing business in different States." Feb. 1991 FERC Amicus Br., p. 12.

[49]The rule of *Arkansas Louisiana Gas* also prohibits other critical assumptions of the Council's Order: that FERC would in 1980 have approved the hypothetical wholesale purchases of coal and sales of nuclear power at prices that the Council's Order assumes. Indeed, the Council has never disputed that FERC would have had jurisdiction over these transactions.

B. Such Collateral Attacks Are Facially Preempted By FERC's Orders.

Because the Council has relitigated the very matters that FERC actually and implicitly decided, its Order epitomizes the state action that is preempted by the Federal Power Act. As the New Hampshire Supreme Court has stated, it would "defeat part of the federal objective of providing orderly and streamlined procedures for approval of wholesale transactions" if each affected state could relitigate matters FERC decided and trap FERC-mandated costs. *Appeal of Sinclair Machine Products, Inc.,* 126 N.H. 822, 830, 498 A.2d 696, 702 (1985).

Indeed, the Council's Order demonstrates that the potential for subversion of the Federal Power Act is unlimited under the "exception" that the Fifth Circuit has recognized. It is always possible to make (or contrive) a finding that a prudent utility should have minimized the "losses" resulting from an unfavorable FERC allocation by selling off high-cost power and by purchasing lower-cost power years before the allocation was established.

The Council's Order proves the point. It is not based merely on findings that are contradicted by FERC's. The Council's findings are so plainly contrary to the Council's other determinations —and so implausible on their face—that the District Court earlier said that the Council's findings were "pulled from thin air" and are a transparent attempt to achieve the 9% allocation that FERC rejected. *NOPSI,* 491 U.S. at 357 n.2 (quoting District Court).

For example, the Council found NOPSI could have and should have sold all but 9% of Grand Gulf at a time when NOPSI did not know what its allocation would be and when the allocation could have realistically ranged from 9% to 29.8%—and theoretically could have been any number. Further, notwithstanding the Council's finding that it was imprudent for NOPSI to have this "indeterminate" Grand Gulf commitment in 1980 (J.A. 155-61, 197-203), the Council finds that there is a "sucker" utility who could have *prudently* then bought all but 9% of NOPSI's indeterminate share. However, the Council has never identified a *single* such utility, but *assumes* its existence by repeatedly citing statements of NOPSI's President in 1980 that are irrelevant by their very terms.[50]

Further, unless such orders are held facially preempted, this case shows that the consequences could be severe. To date, Louisiana courts have affirmed the Council's findings that support a $135 million disallowance on the ground that NOPSI did not bear its "burden" of disproving the Council's assumptions. Further, the Louisiana courts have to date held, as a matter of state law, that the prudence disallowance at issue must be increased to $425.38 million (plus carrying costs)—which would render NOPSI insolvent. *See* pp. 19-20, *supra*.

In this regard, the issue before this Court is not who is right or who is wrong about the facts in 1980: FERC or the Council. Nor

[50]NOPSI's President (James Cain) then stated that *"if"* the Council later disapproved NOPSI's participation in Grand Gulf 1 (as it has not even today), "*then* NOPSI has the option of selling the capacity and marketing it . . . to other electric utilities" and that Mr. Cain believed the power would be "attractive." J.A. 202-03; *see* J.A. 141-43. This statement reflects the MSU system's belief in 1980 that the overall generation costs of Grand Gulf would be lower than any existing alternative. *See* p. 7 n.9, *supra*. But *that* is the belief that the Council found to be "imprudent" and the Council's repeated reliance on this statement to show that a "prudent" buyer existed is the sheerest sophistry.

Most fundamentally, however, *MP&L* explicitly rejected the contention that such representations can "subvert the operation of the Supremacy Clause" and "equitably estop[ ]" a utility from obtaining an order that such prudence disallowances are preempted. *Compare MP&L*, 487 U.S. at 376-77 n.14, *with* J.A. 202-03.

is the issue whether the Council's contrived findings are minimally rational under state law or sustainable under any theory. Rather, it is who is to have jurisdiction to make these determinations and, in particular, whether it would frustrate the regulatory scheme of the Federal Power Act to allow states to nullify the choices FERC has made through such orders. As *MP&L* and *Nantahala* recognize—and as FERC here argues—the answers to these questions are clear: the Federal Power Act gives FERC exclusive jurisdiction over all such prudence claims and must preempt the states from entering orders trapping FERC-mandated costs on any such grounds.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded for the entry of a judgment for NOPSI.

Respectfully submitted,

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